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IN THE

Supreme Court of the United States

October Term, 1974

No. A-1126

73-1936

THE SECRETARY OF SOCIAL AND REHABILITATION SERVICES OF KANSAS,
Petitioner,

v.

SENECA NURSING HOME, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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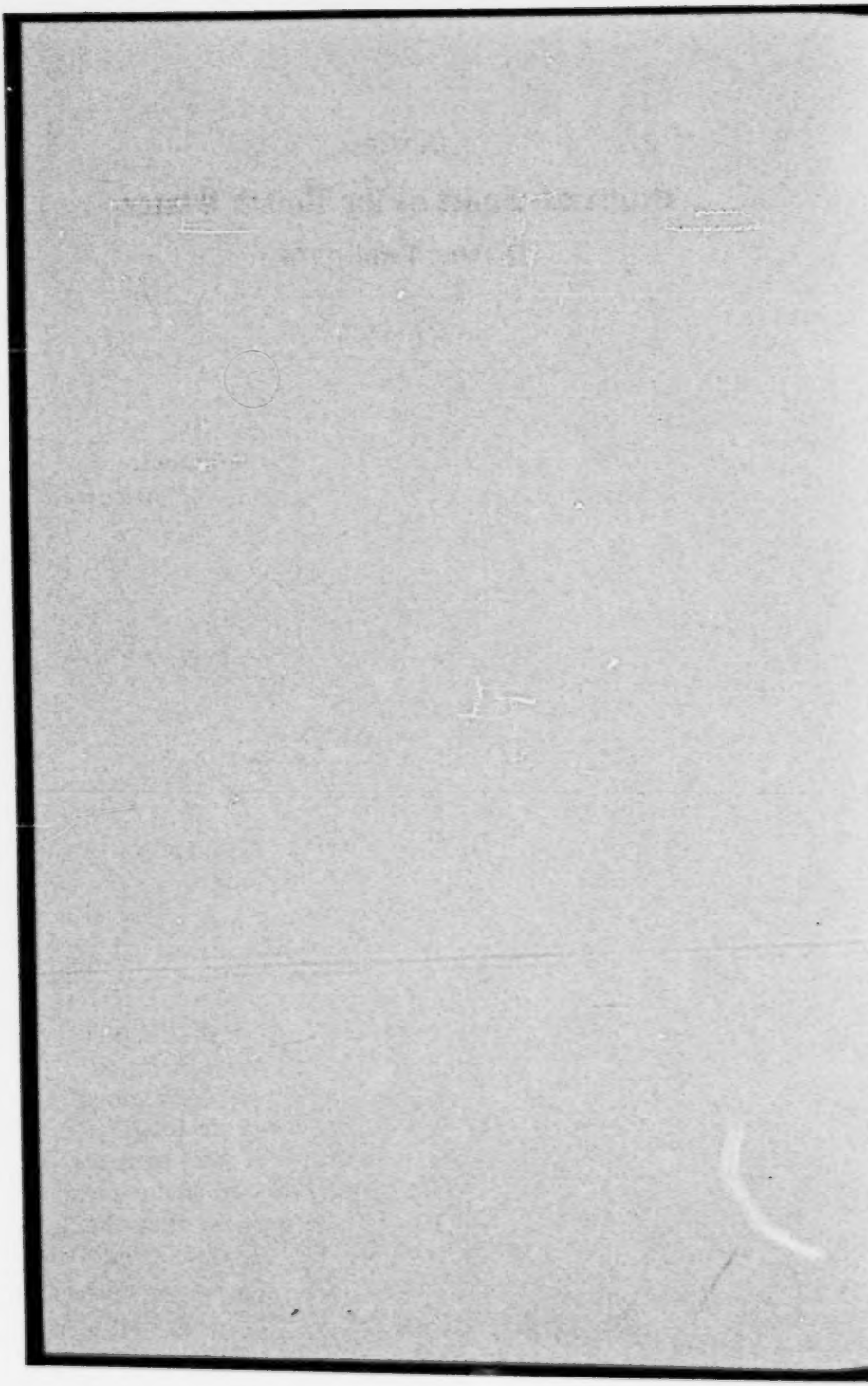

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STATEMENT OF THE CASE

This action originated in the state court in the District Court of Shawnee County, Kansas, in which the Plaintiffs, the Respondents herein, sought an injunction, declaratory judgment and money damages against the State Board of Social Welfare to obtain full payment for the medical assistance in the form of institutional adult care home service which they provide for the Petitioner so that the Petitioner may fulfill its obligation under the state-federal

cooperative program to provide such care to the chronically ill and infirm aged who are medically indigent. The care provided by Respondents is long term.

Jurisdiction for such an action was granted by the State of Kansas in the Session Laws of 1967, Chapter 245, Section 2, in which sub-section (k) authorized contract actions against the Petitioner and in which sub-section (x) required that payment for such medical assistance "shall be the reasonable usual and customary charges . . . ." (Petitioner in its Petition For A Writ of Certiorari on page 8 erroneously quotes sub-section (x); that quotation is from Session Laws of 1971, Chapter 153, Section 1 which amended the sub-section (x) after this action was filed.) [1]

The issues were joined over the validity of an adult care home manual in which the Petitioner attempted to fix the allowable charges which Respondents could make for the long term care of the medically indigent which they provide to the State of Kansas. The Respondents are licensed and regulated by the Kansas State Board of Health, a separate state agency from the Petitioner, and the regulations of that

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[1] Prior to the 1971 amendment, the applicable provision of the statute read as follows:

> "(x) The state board shall take such action as may be necessary to assure that licensed practitioners within the scope of their practice as defined by state law who provide professional services under the provisions of the federal social security act shall be paid their reasonable usual and customary charges. Payment for other medical assistance under the provisions of the federal social security act shall be the reasonable usual and customary charges: *Provided, however,* That if such payments are otherwise limited by federal law, such payments shall be as near the reasonable usual and customary charges as may be permitted by federal law."

agency make no distinction between the medically indigent and non-indigent. Both classes receive care in homes of the Respondents without distinction.

The Respondents complained that the Petitioner refused to make the payments required by the statute and charged that the Petitioner had no authority to fix charges at less than the "reasonable usual and customary charges" established by state statute.

Interlocutory relief was granted by the state court against the Petitioner temporarily enjoining it from implementing the manual, requiring Petitioner to continue making current payments and to apply such payments to such specific charges to be paid by the Petitioner as the Court would finally determine in the action were required by the statute.

After the interlocutory order was issued, the Petitioner removed the action to the United States District Court alleging that the action involved determination of federal questions arising under the Federal Social Security Act and that the amount in controversy exceeded $10,000. After removal the Petitioner filed its answer denying the existence of a contract between Petitioner and Respondents and generally denying all other allegations of the Petition.

Later an amended answer was filed by the Petitioner stating that it is operating a Medical Assistance Plan approved by the Secretary of Health, Education, and Welfare pursuant to Section 1901 of Title XIX of the Social Security Act as amended (42 U.S.C. 1396a); that this plan required the Petitioner to follow and apply all rules and regulations of the Department of Health, Education, and Welfare and that the said plan rules are necessarily put in question by the Petition filed by the Respondents; that the regulations of the Department of Health, Education, and Welfare are contained in Title 45 of the Code of Federal Regulations

and in various publications and directions of that Department; and that the plan is also based upon the Kansas Administrative Regulations contained in Sections 30-1-1 *et seq.*

After initial discovery an amended and supplemental complaint was filed by the Respondents joining the Secretary of Health, Education, and Welfare as a necessary additional party defendant to adjudicate all federal and state issues relating to payment. Answers were filed by all parties and issues joined. The United States District Court found jurisdiction as stated in the Petitioner's Statement of the Case.

The claim by the Petitioner that no contract existed with Respondents was resolved against the Petitioner by the trial court and the United States Court of Appeals for the Tenth Circuit. The terms of the contract were specified by the appellate court to be contained in the state plan under which federal funds were obtained, the statutory measure of payments, and the requirements for licensure of Respondents by the Kansas State Board of Health.

ARGUMENT

I

The first reason advanced by Petitioner for granting the writ is that the Court of Appeals improperly assumed pendent jurisdiction to make factual findings which conflict with the findings of the trial court.

The opinion of the Court of Appeals carefully reviewed and approved the District Court's assumption of pendent jurisdiction, first finding that at least two of the Federal claims "could not be dismissed as obviously without merit and defective as a jurisdictional base." *Seneca Nursing Home v. Kansas State Board of Social Welfare*, 490 F.2d

1324, 1328 (10th Cir. 1974). The Tenth Circuit then observed: "When the declaratory judgment was entered on state grounds the federal claims had not been dismissed or abandoned. In these circumstances and in view of the complexity of the intertwined federal issues, the exercise of pendent jurisdiction was within the reasonable discretion of the trial court." *Id.* at 1329. The brief of the Petitioner fails to advance any adequate basis for granting certiorari for the first asserted reason and the opinion of the Court of Appeals where relevant thereto is clearly correct.

The Petitioner implies that the Court of Appeals contradicted the District Court in finding that an express contract existed between Petitioner and Respondents on which Petitioner could be sued. To support the contention Petitioner cites one sentence in the District Court's lengthy and exhaustive Findings of Fact and Conclusions of Law which makes reference to an implied contract existing between "the state through its welfare board, and the plaintiff providers . . . ." However, as the opinion below recognizes, "this statement was not made with a view to K.S.A. 46-901 [pertaining to the immunity of the State], and we feel it improper to infer any such effect." *Id.* at 1332. The Petitioner is attempting to establish a conflict where none exists between views of the District Court and the Court of Appeals on the contractual relationship between Petitioner and Respondents. Those views are in harmonious agreement that a contract between the parties existed on which the state could be sued to recover damages.

The interpretation by the resident District Judge, affirmed by the Tenth Circuit, of the law of the State of Kansas with respect to Respondents' claims finds strong support in the decision by the Kansas Supreme Court in *Rhodes v. Harder,* 211 Kan. 820, 508 P.2d 959, *modified,* 212 Kan. 500, 512 P.2d 354 (1973), rendered subsequent to the trial court's decision herein. In *Rhodes* an effort by the

Kansas Director of Social Welfare and the Petitioner herein to reimburse physicians, another class of providers of medical services, at less than "reasonable usual and customary" charges was successfully challenged as contrary to the mandate of K.S.A. 39-708(x), the same statute at issue here.

II

The second asserted reason for granting certiorari suggests both the District Court and the Tenth Circuit erred in not including "all state constitutional and statutory provisions" as part of the contractual relationship found to exist between Petitioner and Respondents. Reference is then made to the governmental immunity statute, K.S.A. 46-901, and a provision in the Kansas Constitution concerning appropriations from the state treasury.

The immunity statute issue is an integral element of the first asserted reason for granting certiorari discussed in the preceding part of this brief. The Tenth Circuit addressed the issue and rejected the Petitioner's argument, 490 F.2d at 1332-33, a result supported by the Kansas Supreme Court in *Rhodes v. Harder, supra.*

We fail to comprehend the relevancy of the constitutional provision regarding appropriations from the state treasury. Similar provisions appear in most state constitutions with inconsequential if any effect on the immunity of a state from litigation.

III

The third asserted reason for granting certiorari challenges the comment in the Tenth Circuit opinion that respondents "have standing to assert the claims of indigent welfare recipients . . . ." The reference is to the statement in the

opinion: "And the plaintiffs as recipients of payments would have standing for *themselves* and for the interest of those served by them to assert these claims in view of the relationship to the indigents cared for." (490 F.2d at 1328-29, emphasis added.) Although Respondents agree with the court below that they had standing to represent the interests of their indigent patients, that conclusion need not be defended here since it is superfluous to the clearly correct finding that the Respondents *themselves* had standing to pursue the action.

The Eleventh Amendment

Since the decision in the Tenth Circuit the Supreme Court has decided *Edelman v. Jordan,* 415 U.S. 651 (1974). That decision held that the Eleventh Amendment prevented an award of retroactive damages against a state by a Federal court in an action by welfare recipients. Obviously *Edelman* impacts on the power of the District Court in this case to enter an award for damages in favor of Respondents against the State of Kansas on the reserved claims. Under the District Court order, affirmed by the Court of Appeals, Respondents "are entitled to recover the reasonable, usual and customary charges for medical assistance which they have provided under the provisions of K.S.A. 1970 Supp. 39-708(x) from the date it was originally enacted to July 1, 1971, from defendant, the Kansas State Board of Social Welfare, reduced by payments heretofore received." [2] Respondents submit, however, that the action of the State of Kansas in voluntarily removing the suit from the state court where it was commenced, to the United States District Court, operated to waive the state's immunity under the Eleventh Amendment. The issue was first raised in the petition for writ of certiorari.

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[2]Conclusion of Law, No. 22, Pet. Brief, p. 88.

The removal was allowed in this case pursuant to 28 U.S.C. § 1441(b), which requires that the federal district court have original jurisdiction of the matter. Original jurisdiction was claimed by petitioner under 28 U.S.C. § 1331(a), by asserting the existence of a federal question involving Title XIX of the Social Security Act and the regulations propounded thereunder by the Department of Health, Education, and Welfare and that the matter in controversy exceeded the sum or value of $10,000, exclusive of interest and costs. The clear and overwhelming implication of Petitioner asserting the existence of original jurisdiction under 28 U.S.C. §1331(a) is that Petitioner had waived immunity under the Eleventh Amendment. The amount in controversy requirement, as a jurisdictional requirement, may not be waived. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 547 (1972).

As the amount in controversy requirement may not be waived, the Petitioner in removing and claiming federal question jurisdiction clearly was asserting that the value of the suit's intended benefit to the plaintiff was at least $10,000. In sum, the Petitioner, by acknowledging that the federal court had the power to confer at least a $10,000 benefit on plaintiffs, clearly waived whatever protection it had under the Eleventh Amendment and acknowledged the court's jurisdiction.

In *Great Northern Life Insurance Co. v. Read*, 322 U.S. 47, 54 (1945), quoted with approval in *Edelman*, it was stated:

> "[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."

Petitioner's removal of this case to the federal court system is the clearest possible "declaration of the State's intention to submit its fiscal problems to other courts." It is difficult to perceive what would constitute greater evidence of such intention.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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